

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ZOE L.

Claimant

OAH No. N 2006090825

vs.

NORTH BAY REGIONAL CENTER

Service Agency.

DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings, heard this matter on January 26, 2007, in Santa Rosa, California.

Nancy Ryan, Attorney at Law, represented the service agency North Bay Regional Center (NBRC).

Claimant Zoe L. was represented by Andy Kirk, Law Student, and Adam Brown, Attorney at Law/Executive Director, Community Resources for Independence, 980 Hooper Avenue, Santa Rosa, California 95403.

The matter was submitted on January 26, 2007.

ISSUE

Whether NBRC should be required to fund music therapy for Claimant.

FACTUAL FINDINGS

1. Zoe L. (Claimant) is a five-year-old girl with diagnoses of mild mental retardation, mixed receptive-expressive language disorder, dysarthria and speech dyspraxia. She lives with her mother, father and three-year-old brother in Windsor, California.

2. Claimant attends school in the Windsor Unified School District. She is a kindergarten full inclusion student and has a full-time aide. The school district provides special education services to Claimant, including four 30-minute sessions per week of speech therapy, one 30-minute session per week of occupational therapy and one 30-minute session per week of adaptive physical education. Claimant also receives services from NBRC. Services provided by NBRC include 42 hours per quarter of respite and behavioral training through Associate Behavioral Consultants. The behavioral services provided by NBRC are designed to address Claimant's various behavioral challenges, including tantrums (which often involve aggression towards her brother), inappropriate ways of seeking attention and non-compliant behaviors.

3. Claimant loves and is very responsive to music. In May 2006 Claimant's parents retained music therapist Jamie Blumenthal, MT-BC, to evaluate Claimant for possible receipt of music therapy services. Blumenthal is a NBRC vendor. Blumenthal evaluated Claimant on May 8, 15 and 22, 2006, and June 5, 2006, for approximately one hour each session. Following her assessment, Blumenthal recommended that Claimant receive one to one music therapy services at least one hour per week, and that Claimant's brother be included in a few of the sessions so that verbal interactive strategies could be taught and reinforced at home. In her report Blumenthal noted that Claimant had demonstrated developmental gains during just four assessment sessions.¹ Blumenthal felt that music therapy could be tailored to meet Claimant's needs primarily in the areas of sensory processing, focus of attention, receptive and expressive options, and interactive development. Based on her assessment, Blumenthal developed the following specific music therapy objectives for Claimant: Increase verbal social interaction, increase safety awareness of body movement in space, increase verbal expression of needs and feelings and increase attention to task.

4. Claimant's parents have been paying for music therapy sessions for Claimant since May 2006. Claimant attends music therapy sessions with Blumenthal two to three times per month. Claimant's mother believes Claimant has benefited greatly from music therapy. She has observed that Claimant's oral motor skills have improved noticeably since she began music therapy. Prior to participating in music therapy, Claimant could not blow bubbles, hum into an instrument or sing a full song even though Claimant has been receiving speech therapy since age two. Shortly after Claimant began music therapy she learned to blow bubbles.

¹ Blumenthal indicated Claimant had demonstrated developmental gains by:

- *Increasing her focus of attention during musical events
- *Increasing her imitation of therapist's movements during movement to music events
- *Increasing her acceptance and engagement in oral stimulation tasks
- *Increasing her acceptance and engagement in oral motor tasks
- *Increasing her range of psychomotor responses when engaged in activity
- *Increasing appropriate body pragmatics and interactions when engaged in instrument play, singing, and movement to music experiences
- *Increasing her matching of pitch and rhythm in vocal music activities

Claimant is now able to take a swimming class because she can blow bubbles, and on her 5th birthday she was able to blow out the candles on her birthday cake. Claimant can hum into instruments, and she can remember and sing full songs. Claimant engages in more spontaneous speech and has more and better social interaction with her brother and others. Claimant's attention span has also improved and her frustration tolerance is better. Claimant's mother has noted improvement in Claimant's overall behavior following music therapy sessions. In addition, Claimant's self-esteem has improved significantly as a result of acquiring additional skills through music therapy.

Through music therapy Claimant's mother has also received training in how to use music and related activities to distract Claimant when she is upset. This has helped reduce Claimant's non-compliant behaviors. Claimant's mother believes music therapy helps Claimant in many areas including socialization, managing challenging behaviors, motor development and communication.

5. At hearing Blumenthal explained that music therapy uses music to achieve nonmusical goals. Music therapy uses the elements of music, rhythm, melody and harmony in specific vocal and instrumental activities to elicit physical, cognitive, psychological, emotional and/or behavioral outcomes. It stimulates all of a child's senses and involves the child at many levels, thereby facilitating many developmental skills. It can encourage socialization, self-expression, communication and motor development. It can increase attention to tasks and increase frustration tolerance, as well as provide a feeling of success/reinforcement and an opportunity for the child to control his or her environment. Because music therapy is a pleasurable experience it often motivates a child to respond where other methods fail.

With respect to Claimant, Blumenthal testified that Claimant's music therapy program is geared toward Claimant's social development and activities of daily living outside of school, not educational achievement. Blumenthal has noted significant improvement in Claimant's skills since she began music therapy. When Claimant began music therapy she started to cry whenever she had to use an instrument that involved blowing. Claimant was able to learn how to blow bubbles through song, and has successfully transferred that skill to blowing bubbles during swimming lessons, blowing out candles and independently blowing bubbles from a wand. Claimant has been able to increase her interaction by singing about items that she brings to music therapy sessions and she can now sing an entire song. She is much more verbal after singing and playing the drums. Her eye contact and listening skills have also improved. However, although Claimant has improved significantly, she still has difficulty "attending to task" and there are "still some safety issues." Blumenthal feels Claimant will continue to benefit from music therapy. She recommends that Claimant receive music therapy once a week for one year, and that Claimant be reassessed at the end of that time period. Blumenthal's goals during the one year period will be to decrease Claimant's individual sessions and to get her into a group session where she can interact with her peers.

6. John M. Samples, Ph.D., CCC-SLP, is a Speech-Language Pathologist who evaluated Claimant's speech. In a letter dated November 22, 2005, Samples writes:

[Claimant's] impulsive behavior and interaction delays compound [Claimant's] communication skills as well as safety issues. Music therapy can help [Claimant] with her social skills outside of the therapy sessions. Also, music therapy might improve interaction with others and help [Claimant] attend to tasks better. As a consequence of music therapy, [Claimant] can improve her oral motor skills, such as blowing an instrument.

Music therapy would be a significant adjunct to the therapies already in place for [Claimant].

7. Claimant's Individual Program Plan (IPP) dated July 19, 2006, sets forth various long-range goals and objectives for Claimant. One of Claimant's long range goals is "to increase her speech and articulation." Objective number 2 entitled "Educational" states the mother "would like for [Claimant] to receive music therapy so that she can have increased oral motor control, increased communication, increased fine motor and to use both sides of her brain. "

The IPP goes on to note that NBRC believes that these goals are to be addressed by the school program and that the Client Program Coordinator (CPC) will send the parents a Notice of Proposed Action so that they can begin the appeal process. A Notice of Proposed Action denying the request for music therapy was subsequently issued on August 10, 2006. The stated basis for the denial was: "Objectives are educational and should be addressed through the IEP process."

8. Claimant's mother filed a timely appeal on her daughter's behalf. While the appeal was pending, Claimant's parents sought funding for music therapy from the school district. Their request was denied by letter dated November 27, 2006. The letter states that "Windsor Unified School District does not provide music therapy for its students." Claimant's parents did not appeal the school district's denial of music therapy services.

9. NBRC takes the position that the needs music therapy is designed to address are being met with other supports and services. It reasons that the objectives of increasing Claimant's verbal social interaction, verbal expression of needs and feelings, communication skills and oral motor control skills are language/speech therapy objectives. NBRC points out that Claimant is receiving speech and languages services through Windsor Unified School District pursuant to her Individual Educational Plan (IEP). Recent assessment reports dated March 25, 2006, May 11, 2006, and October 4, 2006, indicate Claimant receives assistance with articulation, sentence development, and communication (receptive and expressive language) under her IEP. NBRC therefore contends the speech and language/articulation goals of Claimant's IPP are being met by the school district.

With respect to increasing fine motor skills and body awareness safety, NBRC reasons that these objectives are adaptive physical education (APE) objectives. NBRC points out that Claimant is receiving Adapted Physical Education (APE) pursuant to her IEP. Goals of Claimant's APE include maintaining body control, balance, eye-hand-foot coordination and motor planning. NBRC also notes that recent occupational therapy (OT) reports dated June 1, 2006, June 9, 2006, and October 2, 2006, indicate that Claimant is receiving OT to address issues of body awareness and motor planning. NBRC contends the motor skill and body safety awareness goals of Claimant's IPP are being met by the school district. The Regional Center concludes that since Claimant's IPP goals are being met by the school district through the IEP process, NBRC does not need to provide music therapy to Claimant.

10. NBRC further contends that if Claimant still feels she wants or needs music therapy, it should be funded by the school district because the goals and objectives of music therapy are essentially educational in nature. It reasons that music therapy is a related service necessary to allow Claimant to fully participate or benefit from special education. NBRC appears to rely upon 34 Code of Federal Regulations part 300.24, subdivision (a), which identifies "related services" the school district is obligated to provide.² It states:

"As used in this part, the term related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training."

Title 20 United States Code section 1401 (22) additionally provides:

"The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with

² When a child who qualifies for special education turns three years old, the child's public school district must provide a "free appropriate public education" and "related services." (Individuals With Disabilities Education Act, 20 U.S.C § 602(3)(b)(i).)

a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.”

11. Based on its determination that the objectives of music therapy are primarily educational, NBRC concludes that it is prohibited under the Lanterman Developmental Disabilities Service Act (Lanterman Act) from funding music therapy for Claimant. NBRC primarily relies upon the following two provisions of the Lanterman Act:

. . . It is further the intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, . . . and reflect the cost-effective use of public resources. (Welf. & Inst. Code, § 4646, subd. (a).)

Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services. (Welf. & Inst. Code, § 4648 subd. (a)(8).)

NBRC interprets these provisions as prohibiting it from funding services if there is another funding source (in this case the school district) that is receiving public funds to provide the services. It is NBRC’s position that because Claimant is receiving services through the school district that are addressing the goals set forth in the IPP (i.e., speech and articulation and increased safety awareness) it is precluded from funding music therapy even if it would have benefits outside of the school setting. NBRC represents it is willing to provide the advocacy for Claimant at her IEP meetings if she seeks music therapy from the school district, but maintains it is barred from funding music therapy because its objectives are primarily educational.

12. NBRC also argues that there is no evidence that music therapy is an accepted (as opposed to an experimental) treatment modality. It maintains Claimant has failed to offer any clear evidence of the effectiveness of music therapy, such as publication of studies regarding the effectiveness of the treatment in a peer review journal. NBRC concedes Blumenthal is an authorized NBRC vendor and currently provides music therapy services to other NBRC consumers. However, it contends the fact Blumenthal is a NBRC vendor is not evidence that music therapy is an accepted treatment modality because vendorization is merely a process through which an applicant seeks authorization to provide services and does not constitute an endorsement or approval of those services.³

³ Vendorization is the process used to determine whether an applicant meets all legal and regulatory requirements to provide service to regional center consumers. (Cal. Code Regs., tit. 17, § 50602, subd. (r).) California Code of Regulations, title 17, section 54310, sets forth the requirements for vendorization. Among other things, it requires an applicant to provide identifying information, proof the applicant has the license, permit, credential and/or academic degree required for performance or operation of the service, program design and program staffing. Nothing in section 54310 indicates compliance with

13. Blumenthal testified that music therapy is a well-established profession that has been in existence since at least the 1950's. It is a discipline taught in many universities and colleges in the United States. Blumenthal received a Bachelor of Arts degree in music therapy from Montclair State University in Upper Montclair, New Jersey, and a Masters of Arts degree in Psychology, with a concentration in Music Therapy, from Antioch University in Santa Barbara, California. Blumenthal is also board certified in music therapy.⁴ In addition, there are various books and publications on music therapy.

LEGAL CONCLUSIONS

1. Under the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.),⁵ the State of California accepts responsibility for persons with developmental disabilities (§ 4501) and pays for the majority of their "treatment and habilitation services and supports" in order to enable such persons to live in the least restrictive environment possible (§ 4502, subd. (a)). The State agency charged with implementing the Lanterman Act is the Department of Developmental Services (DDS). The Lanterman Act authorizes DDS to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (§ 4620.)

2. In order to determine how an individual client is to be served, regional centers are directed to conduct a planning process that results in an individual program plan (IPP) designed to promote as normal a life as possible. (§ 4646; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) The IPP is developed by an interdisciplinary team and must include participation by the client and/or his or her representative. Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services (which must be provided based upon the client's developmental needs), contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§ 4646; § 4646.5, subds. (a)(1), (a)(2) & (a)(4); § 4512(b); § 4648, subd. (a)(6)(E).) Services that may be provided pursuant to the IPP include, but are not limited to, parental training, behavior training and behavior modification programs, daily living skills training and social skills training. (§ 4512, subd. (b).)

vendorization requirements constitutes approval of the offered services by a regional center, or obligates a regional center to fund or purchase any treatment program.

⁴ A national certification examination is offered by the Certification Board of Music Therapy. If an applicant passes the examination, s/he becomes board certified and earns the right to use the credential MT-BC (Music Therapist-Board Certified).

⁵ All citations are to the Welfare and Institutions Code unless otherwise indicated.

3. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner. (§ 4640.7, subd. (b); § 4646, subd. (a).) They are specifically directed not to fund duplicate services that are available through another publicly funded agency. (§ 4648, subd. (a)(8).) Where a service is available elsewhere, the regional center is required to "...identify and pursue all possible sources of funding...." (§ 4659, subd. (a).) However, if a service specified in a client's IPP is not provided by a generic agency the Regional Center must fill the gap (i.e., fund the service) in order to meet the goals set forth in the IPP. (§ 4648, subd. (a)(1); *Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at p. 390.)

4. The evidence established that music therapy would increase Claimant's communication, socialization skills, fine motor skills, attention to task and body safety awareness. NBRC argues these are educationally based objectives that are currently being addressed through Claimant's IEP, and therefore if music therapy is also necessary to address these objectives it should be funded by the school district. Under 34 Code of Federal Regulations part 300.24, subdivision (a), and title 20 United States Code section 1401 (22), the school district must provide related services if those services are necessary to "assist a child with a disability benefit from special education." The focus is clearly on those services that would help the disabled child benefit educationally from her instructional program. NBRC has failed to establish that music therapy constitutes such instruction or service. No showing was made that music therapy was necessary to help Claimant, who has a full time aide at school, benefit from special education. Rather, music therapist Jamie Blumenthal testified that the objectives of Claimant's music therapy program are social and designed to assist Claimant in her activities of daily living. Dr. Samples' letter indicates that music therapy would be an adjunct to Claimant's other therapies and assist with social skills, interaction with others and attention to task. Claimant's mother testified that skills learned in music therapy have helped boost Claimant's self esteem and improved her interaction with her brother and others. Claimant's mother has also received training on how to minimize Claimant's challenging behaviors. Under the Lanterman Act Claimant has a right to daily living skills training and social skills training, as well as parental training. (§4512, subd. (b).)

In this case, the evidence is persuasive that Claimant will benefit substantially from music therapy, which will be reflected in improved behavior, social skills and overall quality of life. The fact that music therapy may simultaneously address educational objectives is an insufficient basis to deny service.

5. While regional center funds may not be used to supplant a generic resource (in this case public education funds) (§ 4648, subd. (a)(8)), it was not established that the school district has a legal responsibility to fund music therapy. Providing funding for music therapy would thus not supplant the budget of the school district nor violate Welfare and Institutions Code section 4648, subdivision (a)(8). Providing such funding would, however, meet the legislative mandate that the IPP and provision of services and supports by the regional center system take into account the needs and preferences of the individual and the family, as well as

promote community integration, and as independent, productive and normal life as possible. (§§ 4646, subd. (a), and 4502, subd. (a).)

6. Although NBRC failed to establish at hearing that the school district has a legal obligation to fund music therapy for Claimant, it still has an obligation to explore the possible availability of such funding. (§ 4659, subd. (a).) Claimant's mother's request for music therapy from the school district was denied. She did not appeal the denial. NBRC has offered to provide advocacy for Claimant during the IEP process. (§ 4648.) That advocacy should extend to seeking funding for music therapy by the school district, either by seeking inclusion of the service in Claimant's IEP or by appealing the denial of the previous request.

7. NBRC also suggests that it should not be required to fund music therapy because it is an experimental program. Its contention is not persuasive. Music therapy is an established professionally certified occupation. It is also a recognized treatment program by the Department of Developmental Services. (Cal. Code Regs., tit. 17, § 54342.). Claimant has clearly benefited and advanced toward the objectives set forth in her IPP through music therapy. In choosing a vendor of services, section 4648, subdivision (a)(6), provides that factors to be considered in addition to the "consumer's choice of providers" is the provider's ability to deliver quality services or supports, a provider's success in achieving the objectives of the IPP, and the existence of licensing, accreditation or professional certification. Consideration of these factors, as well as the fact music therapy is recognized as a treatment program by the Department of Developmental Services, supports recognition of music therapy as a valid intervention.

ORDER

1. Claimant's appeal of North Bay Regional Center's denial of funding for music therapy under the Lanterman Act is granted. North Bay Regional Center shall prospectively fund one hour per week of music therapy for Claimant for a period of one year. The benefits of Claimant's music therapy shall be subject to review by the Interdisciplinary Team at the end of one year.

2. An Interdisciplinary Team meeting shall be convened at the earliest possible date for the purpose of modifying Claimant's Individual Program Plan to provide for implementation and funding of a music therapy program.

DATED: _____

CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is a final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.